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October 17, 2016

VIA E-MAIL AND U.S. MAIL

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Secretary of the Planning Commission
City of Vallejo
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Re: **Vallejo Marine Terminal/Orcem Application for Major Use Permit and Site Development Permit; VMT/Orcem's Demands That City of Vallejo Cease and Desist From Related Violations of CEQA, McAteer-Petris Act, Tidelands Lease, and Due Process; Demand Pursuant to California Government Code Section 54960.2 to Cease and Desist From Violations of Ralph M. Brown Act; Public Records Act Request**

Ladies and Gentlemen:

My law firm represents Vallejo Marine Terminal ("VMT") and Orcem California Inc. ("Orcem") with respect to their above-referenced Project applications and related matters. On October 3, 2016, I wrote to Ms. Ouse and Mr. Keene on behalf of VMT/Orcem. That letter demanded that the City of Vallejo ("City") comply with the California Environmental Quality Act ("CEQA"; Pub. Resources Code, § 21000 et. seq.), and its obligations to VMT/Orcem under the Tidelands Lease and Reimbursement Agreement, and that it present the completed Final Environmental Impact Report ("Final EIR" or "FEIR") to the City's decisionmaking body – the City Planning Commission, subject to appeal to the City Council – for consideration and possible certification in connection with its consideration of the Project approvals at the scheduled December 2016 public hearing. Despite the extensive legal and factual analysis presented, I have received no response to my letter nor any confirmation that the City staff will comply with the law and present the FEIR to the Planning Commission as is clearly required.

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This letter follows up on and supplements my October 3 letter. Specifically, it: (1) requests prompt written confirmation that City staff will comply with CEQA and all applicable law by presenting the FEIR to the Planning Commission for certification in connection with its consideration of the requested Project approvals; (2) demands, pursuant to Gov. Code, §54960.2, that City staff and members of the decisionmaking body immediately cease and desist from past and/or imminent related violations of the Ralph M. Brown Act (Gov. Code, § 54950 et. seq.) that have recently come to light; and (3) requests public records related to the City's relevant actions.

1. The City Must Confirm In Writing That It Will Comply With CEQA, The Parties' Existing Contracts, And BCDC's San Francisco Bay Plan, And That It Will Complete The CEQA Process By Presenting The Final EIR To The Planning Commission.

My 13-page October 3 letter explained in great detail (incorporated by reference, but not repeated here) how the City staff's proposal to withhold the virtually complete FEIR from the Planning Commission's consideration constitutes a violation of CEQA, which prohibits both the decisionmaking body's delegation of its CEQA review function and the splitting up of the environmental review and project approval functions of that body. It explained that the City's proposed actions in this regard are not justified by the *Las Lomas Land Co., LLC* case or any legal authority under the facts here, and that they also violate the Reimbursement Agreement and threaten a total, categorical regulatory taking of all my clients' property rights under the existing Tidelands Lease with the City.

Further, as the City is already aware from correspondence submitted by my clients' planning consultant, Richard Loewke, AICP, the City's General Plan amendments proposed to date – whether providing for open space, Bay Trail, and/or “pending development application” – are all inconsistent with and would strip the Project property of its water-related industrial uses (as a marine terminal) under BCDC's San Francisco Bay Plan and the Tidelands Lease. Such actions are not only inconsistent with City's prior conduct and its obligations of good faith and fair dealing under the Tidelands Lease, but they are flatly prohibited under the McAteer-Petris Act (Gov. Code, § 66650 et. seq.) and the pre-emptive land use designations and policies of the San Francisco Bay Plan authorized and adopted by BCDC under that Act. Additionally, these actions and the City's disparate treatment of the similarly situated adjacent Kiewit property—which retains its industrial designation under the proposed General Plan as a result of its long term lease—violate constitutional guarantees of due process and equal protection.

Despite the blatant illegality of City staff's related proposals and concerted scheme aimed at thwarting VMT/Orcem's Project, I have yet to receive the City's requested assurance that it will comply with CEQA and present the FEIR to the City's Planning Commissioners in connection with their scheduled deliberation and consideration of the Project at the December public hearing – or, for that matter, the courtesy of any response whatsoever to my letter. Accordingly, ***please confirm***

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immediately in writing that the City staff will comply with the law and present the FEIR for the Planning Commission's consideration at the scheduled December 2016 hearing on the Project.

2. The City Must Immediately Cease And Desist From Its Violations Of The Brown Act Through Scheduling and Conducting Non-Noticed, Non-Public Serial Meetings Between Staff And Individual Planning Commissioners To Discuss The VMT/Orcem Project.

It is our understanding that, even after members of City staff and a former City official have publicly expressed negative opinions on the pending Project's merits, you have arranged non-public, non-noticed serial meetings between three staff members and four or more individual Planning Commissioners (with one Commissioner attending each meeting) to discuss the merits of the Project. As explained below, and especially given City's public expressions and now-documented unlawful efforts to derail the Project, these latest actions (whether past, ongoing and/or threatened) are clearly in violation of the Ralph M. Brown Act (the "Brown Act," Gov. Code, § 54950 et. seq.), and we hereby demand on VMT/Orcem's behalf that City immediately cease and desist from undertaking, or further undertaking, them.

The Brown Act is based on the Legislative finding and declaration "that the public commissions, boards and councils ... in this State exist to aid in the conduct of the people's business." (Gov. Code, § 54950.) Thus, "[i]t is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." (*Id.*) The Brown Act applies to the "legislative body of a local agency" (§ 54953), which is broadly defined to include, inter alia, "[t]he governing body of a local agency or any other local body created by state or federal statute" and any "commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of legislative body." (§ 54952(a),(b).)

The City's Planning Commission and City Council, inter alia, are thus both considered to be legislative bodies of the City for purposes of the Brown Act, and both actual members and members-elect of these bodies are subject to its restrictions. (§ 54592.1.)

At the heart of the Brown Act and relevant to the violations here are its open and public meeting provisions: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953(a); *see Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1149 ["Brown Act ... governs the conduct of local legislative bodies and imposes upon them various obligations, including giving prior notice of meetings and making the meetings open to the public."], citing *Regents of University of California v. Superior Court* (1999)

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20 Cal.4th 509, 520, fn. 5.) Further pertinent to the unlawful serial meetings at issue here are the following provisions of the Act:

A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(Gov. Code, § 54952.2(b)(1).)

As explained by the California Attorney General's Office, "[t]he Act expressly prohibits serial meetings that are conducted through direct communications, personal intermediaries or technological devices for the purpose of developing a concurrence as to action to be taken." (Cal. Atty. Gen. Office, *The Brown Act – Open Meetings For Local Legislative Bodies* (2003) [hereafter, "*The Brown Act*"], p. 11, citing § 54952.2(b); *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 103.) Per the Attorney General:

Conversations which advance or clarify a [legislative body] member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications which contribute to the development of a concurrence as to action to be taken by the legislative body. Accordingly, with respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members of legislative bodies should avoid serial communications of a substantive nature concerning such items.

Problems arise when systematic communications begin to occur which involve members of the board acquiring substantive information for an upcoming meeting or engaging in debate, discussion, lobbying or any other aspect of the deliberative process either among themselves or with staff. For example, executive officers may wish to brief their members on policy decisions and background events concerning proposed agenda items. This office believes that a court could determine that such communications violate the Act, because such discussions are part of the deliberative process. If these communications are permitted to occur in private, a large part of the

process by which members reach their decisions may have occurred outside the public eye. Under these circumstances, the public would be able only to witness a shorthand version of the deliberative process, and its ability to monitor and contribute to the decision-making process would be curtailed.

Therefore, we recommend that when the executive director is faced with this situation, he or she prepare a memorandum outlining the issues for all of the members of the board as well as the public. In this way, the serial meeting violation may be avoided and everyone will have the benefit of reacting to the same information.

(*The Brown Act, supra*, at p. 12.)

In sum, prohibited serial meetings with individual members to develop a collective concurrence occur where *either* deliberation or decisionmaking occurs, and deliberation encompasses situations where the legislative body's member is gathering facts, exchanging facts, assessing or weighing facts or applying facts to policy. ***We hereby demand that the City and its staff cease and desist from conducting serial staff meetings with individual Planning Commissioners concerning VMT/Orcem's Project; if such meetings are to occur prior to the December hearing on the Project, they should be duly noticed, agendized and conducted in public in accordance with the law so that representatives of VMT/Orcem may attend, monitor and participate.***

3. Public Records Act Request.

Pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.) and all other applicable law, we hereby request that the City provide us with copies of public records pertaining to the following:

- Any meeting(s) or communication(s) between (1) City Manager Daniel Keene, Economic Development Director Ursula Luna-Reynosa, or Planning Manager Michelle D. Hightower and (2) any member of the City Planning Commission or City Council pertaining to the Project, including without limitation any decision or proposal to delay or discontinue completion of the Project's Final EIR, any decision or proposal to not present the Project's Final EIR to the Planning Commission, or any decision or proposal to recommend denial of the Project.
- Any meeting(s) or communication(s) between (1) any City staff member, agent, or representative, including without limitation employees of the City Manager's office, City Economic Development Division, Building Division, or City Planning Division (e.g., Ms. Andrea Ouse) and (2) any member of the

City Planning Commission or City Council pertaining to the Project, including without limitation any decision or proposal to delay completion of the Project's Final EIR, any decision or proposal to not present the Project's Final EIR to the Planning Commission, or any decision or proposal to recommend denial of the Project.

- Any meeting(s) or communication(s) between (1) any member of the City Planning Commission and (2) any member of the City Council pertaining to the Project, including without limitation any decision or proposal to delay completion of the Project's Final EIR, any decision or proposal to not present the Project's Final EIR to the Planning Commission, or any decision or proposal to recommend denial of the Project.
- Any meeting(s) or communication(s) among members of the City Planning Commission pertaining to the Project, including without limitation any decision or proposal to delay completion of the Project's Final EIR, any decision or proposal to not present the Project's Final EIR to the Planning Commission, or any decision or proposal to recommend denial of the Project.
- Any meeting(s) or communication(s) among members of the City Council pertaining to the Project, including without limitation any decision or proposal to delay completion of the Project's Final EIR, any decision or proposal to not present the Project's Final EIR to the Planning Commission, or any decision or proposal to recommend denial of the Project.
- Any meeting(s) or communication(s) between (1) any member of the City Planning Commission or City Council and (2) any other party not mentioned above, including without limitation members of the Vallejo General Plan Working Group, members of the Economic Vitality Commission, and members of the public, that pertains to the Project, including without limitation any decision or proposal to delay completion of the Project's Final EIR, any decision or proposal to not present the Project's Final EIR to the Planning Commission, or any decision or proposal to recommend denial of the Project.
- All correspondence between City Staff regarding non-agendized discussions of the Project during General Plan Working Group meetings, including, but not limited to those that resulted in City Attorney Claudia Quintana's attendance at General Plan Working Group meeting(s) in October, November, December of 2015.
- Accounting records or other documents pertaining to staff time spent processing the Project and associated costs therewith, including without limitation time spent by contract City planning staff, time spent reviewing the Project's application, and time spent on the Project's environmental review.

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- Accounting records or other documents pertaining to City fees and other charges the City has levied on VMT, Orcem or their representatives pertaining to the processing the Project.
- Documents pertaining to the City's consideration of candidates and qualifications for the Planning Manager position filled by Dina Tasini in November 2015.
- Documents pertaining to a Vallejo General Plan Working Group meeting held on April 30, 2016, including without limitation any Microsoft PowerPoint presentations prepared for and/or used at the aforesaid meeting.
- Documents pertaining to Vallejo General Plan Working Group meetings or workshops held in in September and/or October 2015, including without limitation public meetings held to solicit community comment on any General Plan alternatives, including without limitation the Draft Preferred Future General Plan Scenario, and any associated presentation materials and City Staff, any documents pertaining to small group discussions between members of the public and General Plan Working Group, and any documents concerning instruction to the public on the goals, procedures or processes of these meetings or workshops.
- A list of all City staff, City attorneys, City Planning Commission members, and City Councilmembers in attendance at the October 26, 2015 General Plan Working Group meeting.
- Any meeting(s) or communication(s) between (1) any City staff member, agent, or representative, including without limitation employees of the City Manager's office, City Economic Development Division, Building Division, or City Planning Division (e.g., Ms. Andrea Ouse) and (2) any member of the Vallejo General Plan Working Group pertaining to the City's leasing of the Kiewit Pacific site since the City initiated its General Plan Update process, including without limitation any City plans or proposals to amend or otherwise change the terms or scope of the Kiewit Pacific site lease.
- Any meeting(s) or communication(s) between (1) any City staff member, agent, or representative, including without limitation employees of the City Manager's office, City Economic Development Division, Building Division, or City Planning Division (e.g., Ms. Andrea Ouse) and (2) any member of the Vallejo General Plan Working Group pertaining to the any plan or proposal to establish a trail alongside the entire east bank of the Mare Island Strait from Cal Maritime Academy to the Marina downtown, including without limitation through the Project site and the Kiewit Pacific site.

For purposes of this Public Records Act request, the term "pertain(s)" and "pertaining," shall include any writing which evidences, is about, relates to,

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constitutes, supports, refutes, repudiates, ratifies, memorializes, explains, addresses, comments upon, criticizes, or describes the particular topic or described subject matter; the term "writing" or "written" shall mean any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored; the term "document" or "documents" shall mean any kind of written matter, however produced or reproduced, of any kind of description, whether sent, received or neither, including originals, copies and drafts and both sides thereof, and including, but not limited to: papers, books, letters, electronic mail, photographs, objects, surveys, calculations, summaries, tangible things, correspondence, memoranda, notes, notations, work papers, minutes, reports and recordings of telephone or other conversations, manuals, reports, contracts, agreements, desk calendars, appointment books, computer printouts, data processing input and output, microfilms, papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, all other records kept by electronic, photographic or mechanical means, and things similar to the foregoing however denominated. Documents shall include without limitation electronic mail and text messages created on, received on, or sent from personal telephone, mobile, or other devices where those communications relate to the conduct of municipal or public affairs.

Pursuant to Government Code section 6253(c), the City has **ten days** from receipt of this request to make a determination regarding whether this request, in whole or in part, seeks copies of disclosable public records in your possession and the reasons for such determination.

For any responsive public record kept in electronic format, we request that an electronic copy of the document be produced in that format, pursuant to Government Code section 6253.9. If documents are voluminous, then please indicate in your response the approximate volume of documents responsive to this request, and the location, dates, and times upon which inspection will be permitted. If you can provide documents in response to one or more of the above requests sooner than for others, please so indicate, and I will arrange for their pick up as such documents become available.

If you determine that some or all of the requested documents, or portions of documents, are exempt from disclosure, please describe the withheld documents and/or deleted portions of documents in detail. Please also specify the statutory basis for any denial of this request, or portion thereof, as well as your reasons for believing that the statutory justification applies. In addition, reasonably segregable portions of documents must be made available even if other portions of the requested documents are exempt.

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Conclusion: We again urge the City staff to ensure that City complies with CEQA, and its contract, due process and equal protection obligations; we further demand that it comply with the Brown Act – and immediately cease and desist from past, ongoing and/or threatened violations thereof – and that it also comply with the McAteer-Petris Act and BCDC's San Francisco Bay Plan. Simply put, the City must fully comply with duties, obligations and actions enjoined on it by law, and respect VMT/Orcem's property rights, in order to avoid extreme damages to our clients and ensuing litigation. City must provide prompt written assurance that the completed Project FEIR will be presented to the Planning Commission for its consideration at the scheduled December public hearing on the Project, so that that body can exercise the full measure of its lawful discretionary decisionmaking authority over the FEIR and Project, and so that it will also have the benefit of all of the environmental information required by CEQA (and for which our clients have paid at great expense) when that body considers the merits of the proposed Project. Finally, we look forward to timely receiving the requested public records.

Should you have any questions, please do not hesitate to contact the undersigned. Thank you in advance for your anticipated prompt attention and response regarding these critically important matters.

Very truly yours,

MILLER STARR REGALIA



Arthur F. Coon

AFC:nmt

cc: Claudia Quintana, City Attorney (claudia.quintana@cityofvallejo.net)
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